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Supreme Court of the United States.

October Term 1905.

No. 360

Advanced for Hearing Jan. 8th 1905.

W. H. Carfer, Sheriff of wood County. W. Va
Appellant.
vs:
Charles T. Caldwell,
Appellee.

Appealed from the Circuit Court of the United States for the Northern District of West Va.

Brief of the Appellee

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HISTORY OF THE CASE.

While the only question certified to this Court by the Circuit Court of the United States for the Northern District of West Virginia is that of Federal Jurisdiction. we deem it proper that this Court should be in possession of all the facts in the case as Sidelights to illumine the entire course of this litigation; and, if they do not aid this court

in analysing the opinion of the Lower Court, and in coming to the same conclusion, it will certainly do no harm.

The regular session of the Legislature of West Virginia for the year 1905, during which the cause of these proceedings originated, began the second Wednesday in January, 1905, in pursuance of Section 18, Article 6, of the State Constitution. All regular sessions of the Legislature of West Virginia are limited to forty-five days.

During the latter part of the session of the Legislature for the year 1905, Albert B. White, Governor, whose term of office expired on March 4th following, sent to the Senate, of which body Defendant in Error was a member, a special message reflecting upon the official integrity of Defendant in Error, together with a resolution appointing a committee of investigation of the matters alleged in said special message. The special message was accompanied by a part of a newspaper clipping from an irresponsible publication that attacked Defendant in Error, with others among whom was the then Secretary of State, now Governor, and a Federal Officeholder. The message contained only that part of the scurrilous article of the newspaper referring to Defendant in Error. The special message and resolution shocked the members of the Senate; and, as a matter of course, precipitated a discussion on the floor of the Senate in which the Defendant in Error participated; and during the discussion the Defendant in Error, as a member of the Senate and against whom the charges were directed in said special message of the Governor, knowing the charges were false and unfounded, took part in the discussion and was not very choice in the language he used in defence of the unprovoked, false and malicious assault made upon him in said message and accompaning publication. *All that was said and all charges that were made in debate and discussion of the message, resolution and proceedings, were made while the Senate was in session*, and Defendant in Error cannot be compelled or requtred to answer in any place other than the Senate for anything he said because the latter part of Section 17 of Article 6 of the Constitution of West Virginia provides, "Members of the Legislature shall, in all

cases except treason, felony and breach of the peace, be privileged from arrest during the session and for ten days before and after the Session; and *for words spoken in debate, or any report, motion or proposition made in either House,* A MEMBER SHALL NOT BE QUESTIONED IN ANY OTHER PLACE."

After the discussion of the questions hereinbefore referred to the special message was returned to the Governor by unanimous vote of the Senate by the Sergeant-At-Arms with the request that he accompany his message with the *entire newspaper article* referred to in the message, instead of the garbled part of the article which accompanied his message. The ready made resolution was, upon motion, laid upon the table in the Senate, which resolution was afterwards taken up, amended as shown by the proceedings of the Senate; a committee of investigation, composed of three Senators, Oliver S. Marshall, C. E. Carrigan and W. H. McGinnis, was appointed by the Senate to consider the charges made; and, after reading the evidence and duly considering, Caldwell was exonerated of said charges made against the Governor's message by the Committee, and the Governor received a "Clean Bill of Fare" by the report of the Committee; and, so far as within their power, the escutcheon of his character, if ever tarnished was reburnished. If these proceedings are for the only purpose of vindicating the Ex-Governor and his family; then it is respectfuily submitted he is seeking a novel proceedure for such purpose, and if he has the right to appeal to a Legislative Committee, then we insist he was vindicated by a Committee of the Senate, the only body having jurisdiction to investigate the matters complained of. Defendant in Error simply contented himself by submitting his evidence fully disproving, in every particular, the fowl and false charges made against him in the message and accompanying documents of the Governor. Said committee completely exonerated Caldwell from the unfounded and malicious accusation. It seems the Governor gave no thought of how his message charging Caldwell with infamous conduct as a State Senator. Would effect him and his family. There was present at

said meeting many of the Senators; the Governor, White, who had asked for the Committee of Investigation; W. M. O. Dawson, the then Secretary of State and now Governor of West Virginia, together with a great many other spectators who had gathered for the purpose of listening to the Senatorial investigation. At the urgent solicitation of the then Secretary of State, now Governor, and many others, and because Defendant in Error believed and still believes that the then Governor had no right to question anything that had been said by him in debate or discussion on the floor of the Senate; that the Governor had no right to question or call to account any Senator for remarks made on the floor of the Senate on matters properly before it for discussion or consideration, and especially at *any other place than the Senate*, and not even there for remarks on a public document properly before the Senate for consideration, so long as the criticism did not violate the rules of the Senate. Hence Caldwell declined to offer any evidence, except to refute the charges made against himself.

Not contented with his acquittal, by a committee of the proper form, appointed at his own request, where the language complained of was used, in the expiring hours of the Legislature, while the members were engaged in packing up their Legislative assets, and were congratulating each other on the near approach of the time when their arduous labors would be over and they could return to their home and disappointed constituents, the Governor was attacked suddenly with a fancied suspicion that his acquittal by the Senatorial Committee was an acquittal but not a vindication. Therefore, he sent a special message to the *House of Delegates* claiming that charges had been made against him by a Senator (the same charges investigated by the Senate, the same Senator and the same Governor) which charges had found their way into the columns of the public press, which last message, accompanied by a resolution similar to the one offered in the Senate, reciting that *he* wanted to be exonerated and his *family* vindicated from the charges thus made and asking the appointment of a committee of the HOUSE OF DELE-

GATES to investigate the charges made by a SENATOR on the floor of the Senate in discussion; and the first information of the appointment of said committee received by Caldwell, the Defendant in Error, was after the adjournment of the Legislature when he was summoned before a committee to testify as to what he had said in discussion on the floor of the Senate and what he knew, if anything, about the charges. Thereupon when he was summoned in the City of Parkersburg, One Hundred and Twenty Miles from Charleston, the Seat of Government, by the nearest route by rail, he demanded the fees and his milage and also claimed that he had no right to be questioned about what he had said in the discussion on the floor of the Senate by the alleged Committee of the House of Delegates or anybody else at any place other than the Senate where the charges were made in public discussion, and chalanged the constitutional right of said committee or its attorneys or authorities to arrest him under the attachment issued against him directed to W. H. Carfer, Sheriff of Wood County.

It is true Governor White has an estimable family, and so has Defendant in Error. His family is just as sensitive as the Ex-Governor's family about his character, and as jealous of his good name as the Governor's family is of his name. It is a case of modernizing or applying the old adage, "That people living in glass houses should not throw stones." Or that "Fools often but in where angels fear to tread."

There were no exceptions taken to the findings of the Senate Committee of Investigation. It was a special message addressed to the Senate alone; the committee was appointed at the request of the Governor; the only divergeance from the Governor's prearranged programs was that the Senate appointed the Committee, instead of the President of the Senate, as intended by the original resolution.

HABEAS CORPUS PROCEEDINGS.

The History of these proceedings contained in the record in this case and now before this Honorable Court

upon Appeal involves the jurisdiction of the Circuit Court of the United States for the Northern District of West Virginia in taking cognizance of the petition for Habeas Corpus.

The opinion of Judge Alston G. Dayton of the Northern District of West Virginia, made part of the record, seems to clearly and fully sustain Federal Jurisdiction in this case. To copy the opinion and again cite the authorities contained therein, in this brief, upon which the lower Court based its jurisdiction would be superfluous and therefore we will respectfully request this Court to consider the able, lucid and sound reasoning of Judge Dayton as part of this brief, and in support of the contentions of Defendant in Error.

JURISDICTION.

Section (1) One, Article (1) One, of the Constitution of West Virginia provides that "The Constitution of the United States of America, and the laws and treaties made in pursuance thereof, shall be the supreme Law of the Land."

Section (3) Three of Article (1) One of the same Constitution further provides that "The Provisions of the Constitution of the United States, and of this State, are operative alike in a period of war as in time of peace, and any departure therefrom or violation thereof, under the plea of necessity, or any other plea, is subervise of good Government, and tends to Anarchy and despotism."

Under the first above cited Section of our State Constitution of the United States is made the Supreme Law of the Land, which includes West Virginia, or at least ought to do so. It is not only a very important part of this land, constitutionally, but politically. In the same Section it is provided that said State of West Virginia "shall remain" as such, never to be severed or blotted out; everlastingly to remain by the express term of the Organic Law. And the Federal Constitution shall be its Superior Law. Therefore, any citizen of the United States and West Virginia has the right, when his life, liberty or property is in jeopardy, to appeal to the

supreme authority of the law, the Constitution of the United States. The great and magnificent document is a shield of protection, beneath, above and around every American citizen. And it is made the highest law in West Virginia.

Section (3) Three, (1) One of the State Constitution says that the Federal Constitution and the provisions of the State Constitution are operative alike in West Virginia. Now if this be true as the State Constitution declares, has not a citizen of this State the right to seek protection under eith r Constitution he may choose. Under this Section of the State Constitution could a valid law be enacted that might be proper under the State Constitution but in conflict with the Federal Constitution? We think not.

The latter part of the fourteenth (14th) Amendment to the Federal Constitution says,

"Nor shall any state deprive any person of life, liberty or property without due process of law, etc.

The same provision is found in the State Constitution and these two provisions are "operative alike"; in the same manner and to the same purpose and effect.

DUE PROCESS OF LAW.

If the proceedings in which the attachment for Caldwells arrest were, wholly without legal authority, and in conflict with the provisions of the Federal Constitution which are of like effect as the provisions of the Constitution of West Virginia, in this State, then the attachment is *not "Due Process of Law,"* but, is a proceeding without "due process of law."

"*Due process of law.*" *undoubtedly means,* in the due course of *legal proceeding* according to those rules and forms which have been established for the "protection of private rights."

Cooleys Const. Lim. 6th ad. p. 433.

Note to Pearson et al against John Yendall et al 95, U. S., page 436, L. Ad. and citations therein made, Portlan vs. Banzer, 65, Me. 120. Am. Reports 681. Same 19. Am. Reports 656.

There is another question of law bearing upon the issue

of jurisdiction to which we desire to direct the attention of this Court. It is this: In the statute of West Virginia Sec. 7, Chapter 12, Code, transplanted from the Law of Virginia, Enacted by the Legislature of that State prior *to the Code of 1819*. It is claimed by Counsel for appellant in their ingeniously and skillfully prepaired brief that Caldwell's remedy is in the State of West Virginia, and that the Federal Courts have no jurisdiction until, at least the highest Court in W. Va. has passed npon the same. This Court will, upon examination, see there is no provision, in this imported piece of the Virginia Statute. 86 year old for any remedy of Error of either Law or fact. No appeal is provided for from the arbitrary rulings or judgment of the alleged Committee; they could consign Caldwell to the dungeon on bread andwater, so far as that statute provides until the next session of the Legislature or indefinitely, no right of exceptions, no remedy by Writ of Error or Appeal. Are proceedings under such a *hydrid* Statue, "*Due process of Law?*"

But there is a far greater reason why the attachment for the arrest of Caldwell is not "due process of Law." If the Court will examine closely, Sec, 7, Ch. 12, Code of W. Va., the power to purish and imprison one for disobedience, is only conferred (1) upon the Legislature, or the branch of the Legislature appointing by the Committee.

(2). Upon a joint Committee or concurrent Committees, appointed by a joint or Concurrent resolution of as the branches of the Legislature.

(1) Disobedience to the summons of the Committee is punished by the presiding officer of the house that appointed the Committee, and *no one else*; No other power. If the Legislature has recessed, adjourned, as it may do under Sec. 23, Art. 6, Const. for any length of time it may agree upon, jointly. Such adjournment would be called a recess, during which adjournment Committees could hold meeting if authorized, and enforce obedience to its Writs, only.

(2) "And when a Commtttee is appointed by each House, under any joint or *concurrent resolution* and directed to sit *jointly*, with authority to examine witness or send for persons and papers, the summons may be signed by the Chairman of the Committee on

the part of the Senate or the Chairman of the Committee on the part of the house of delegates; and disobedience thereto may be enforced as aforesaid by the *house* which appointed the Committee, which directed the summons to be issued; *and if such Committees* be authorized to sit during the recess of the Legislature, then obedience to the summons aforesaid may be enforced *as aforesaid* by the Committee which directed the summons to be issued.

The word "recess" is used in connection with Legislative Committees, and no referrence is made to the Existance of Committees *after the adiournment* of Legislature *Sine-Die*. In fact there is no Law. Neither Sec. 7, Chapter 12, of the W. Va. Code, or any other Statute of the State authorizes the appointment of a Committee *to set* from one *bienvial* session of the Legislature to another session of a new Legislature *two* (2) years hence, My-Gracious; Think, of such power: A Committee consisting of three persons, all from the rural districts. One a farmer, one a stock raiser and the other one a Lawyer, having conferred upon them the power to deprive one of his liberty and incarcerate him in a foul dungeon for life, as there is no limitation to the imprisonment under the Statute referred to, because he refused to bolster up the reputation of an Ex-Governor, and *vindicat his family*, when nothlng disparaging has been said.

In cases where the *right* of appeal seems inadequate by reasons of its delay, the Court may hold the person entitled to the Writ as a means of speedy determination of the question.

Sec. Expartee Keiffer
40 F. R. P. 399.

In Caldwell's case, under the alleged Sec. 7. Ch. 12. There is no appeal provided, and no Writ of Error can issue. This is a much stranger case than the Keiffer case.

In general the Writ may be issued by Federal Courts in *every* case where a party is restrained of his liberty without "due process of law" in the territorial jurisdiction of such Court."

40 F. R. p. 66, Cunningham vs Nagle. 135. U. S. page 1—and authorities there cited. State of New York

vs Eno. 155, U. S. p. 88 and citations. In re. Huse 79, F. R. page 305.

The above authorities sustain several jurisdiction in cases, in which State Courts have been proceeding against violators of the Criminal Laws of such States. It is true they hold it not obligatory upon the Federal Courts to take Cognizance of such cases. But discretionary, only now in Caldwell's the facts and circumstances are far different from those of any of the cases referred to in the above cited authorities. He was arrested for refusing to attend a meeting of an alleged Committee and testify to clear up the reputation of an Ex-Governor who preferred his own charges against himself, and to vindicate his family whose names were never meationed by "A Senator" except in a respectful and most refined manner. It is said in the *Book* of books something about the fathers eating sour grapes and setting their childrens teeth on edge, but this did not refer to the Ex-Governor of West Virginia.

Article Fourteen (14) of the Amendments to the Constitution of the United States provides and says "Nor Shall any State deprive any person of life, liberty or property without *Due Process of Law*." The State Constitution, Section Ten (10) of Article Three (3), page 28 of the Code of West Virginia, of which this Court will take judicial notice, provides as follows: "No person shall be deprived of life, liberty or property without *Due process of Law* and the judgment of his peers." The conjunction "and" in said Section of the State Constitution has been construed to mean "or."—Sec. 27th W. Va., 275.

Now, under Section Three (3) of Article (One) of the State Constitution, hereinbefore quoted, it is provided that, "The provisions of the Federal Constitution operate alike with the provisions of the Constitution of this State." This being the language of the two Constitutions for the protection of life, liberty and property of a citizen, and alike operative in this State, they are of equal force and effect in the State of West Virginia; and being so, there is no question as to the jurisdiction of the Federal Court in proceedings involving the life, liberty and property of

the aggrieved citizen, and in support of this proposition we refer this Honorable Court to the Case of State vs. Sponaugle et al, 45 W. Va., page 424, being the latest declaration of the State Supreme Court of Appeals upon Section 10, and especially that part of said Section which contains the words, "Due process of Law," which has never yet been clearly and fuliy defined and established, because the question of whether or not the proceedings in the case are *Due Process of Law* depends wholly solely and entirely upon the origin and the circumstances of the each separate case, and as long as there continues to be different facts and circumstances arising in the various matters of litigation, no fixed and determined rule can be adopted applicable to every case that may arise in the various Courts, Federal and State. The latest Standard work upon the question of *Due Process of Law*, without which one cannot be deprived of life, liberty or property is McGee on Due Process of Law, being a very late publication. The Supreme Court of West Virginia in the case above referred to, Judge Brannon, one of the ablest jurists in the State of West Virginia, in rendering the opinion of the Court without a discent, at page 424 above referred to, in discussing the question of "*Due Process of Law*," says, "For the first time that amendment 14th to the Federal Courts of Appeals gave the National Government the vote power upon State action upon the citizen not consonant with Due process of Law, but it gave no new definition of the term, "Due Process of Law," or its equivalent; Law of the Land. Before it, the State had final right to say whether the act was Due Process; after it, the Supreme Court has. That is all," Showing that the Supreme Court of West Virginia in its construction of Section 10 of the State Constitution, recognized the fact that the Supreme Court of the United States now has the power, authority and jurisdiction to say and determine what is meant by "Due Process of Law." This Court will bear in mind the fact that the proceedings in which Caldwell was arrested by the Sheriff of Wood County were not instituted in any Court of Record in any suit or procedings from which he would be entitled to an appea l.

It is true the Constitution of the State of West Virginia, to the provisions of which the attention of the Court is respectfully invited, defines the powers and duties of each House of the Legislature, and by implication, if not by plain provisions, says in Section 28, Article 6 of the State Constitution, "Each House shall have power to provide for its own safety, and the undisturbed transaction of its business, and may punish, by imprisonment, *any person* not a member, for disrespectful behavior in its presence; for obstructing any of its proceedings, or any of its officers in discharge of his duties, or for any assault, threat or abuse of a member, for words spoken in debate. But such imprisonment shall not extend beyond the termination of the Session, and shall not prevent the punishment of any evidence, by the ordinary Courts of Law."

This provision of the Constitution does not include for a punishment to any person unless that person *be not a member*. But any person not a member punished by imprisonment by the House in which the offence was committed shall not be kept in imprisonment longer than the termination of the Session.

We further desire to call the attention of this Eminent Court to Section 17 of Article 6 of the State Constitution which provides "Members of the Legislature, in all cases except treason, felony and breach of the peace, be privileged from arrest during the Session, and for ten days before and after the same; *and for words spoken in debate or any report, motion or proposition, made in either House, a member shall not be questioned in any other place.*"

The gravaman of Governor White's complain to the House of Delegates, upon which the Investigating Committee was appointed, is, "That a member of the State Senate had made certain charges against him, which charges had been printed broadcast in the newspapers." Then after reciting the charges and protesting his innocence, he proceeds to state that in the State Senate a committee was raised to investigate these charges; that he and others appeared before the committee and made statements and that it was uhderstood that the committee

would take no further testimony; that he feels that the great charges made against him have not been fully investigated, especially as there were rumors in circulation that there was evidence of the truthfulness of the charges, or one of the charges, made against him, which evidence was not presented but withheld under some sort of alleged agreement or understanding, and this alleged fact had been stated in some newspapers. Then he goes on about the sole power of impeachment under the Constitution, and that if he were guilty of the charges or any of them, he ought to be found guilty and punished by impeachment (an impossible procedure for the want of time if for no other reason) and that he ought to be, if innocent, so declared and his "good name" and that of his family vindicated.

The gravaman, as hereinbefore stated, of this complaint, made by the Governor, is that he wants *"his good name protected and his family vindicated."* His family needs no vindication at the hands of a Legislative Committee. The Committee appointed by the House of Delegates of an expiring Legislature has no authority or power, after the adjournment of the House of Delegates and the entire Legislature, to sit in Star Chamber proceeding for the purpose of inquiring into the *innocency of "Governor White or for the purpose of vindicaiing his fawily,"* who needs no vindication.

The State Constitution of West Virginia, under Section 25 of Article 6 of the State Constitution, "Each House may punish its own members for disorderly behavior with the concurrence of two-thirds of the members elected thereto, expel a member, etc.

The committee asked for by Governor White in his special message to the House of Delegates found at page 23. was dated February 24, 1905, within a few hours before adjournment of the regular Session of the Legislature by reasons of its constitutional limit, in which the charges cemplained of were made by the Senator, if made at all, and within eight days of the Constitutional Limitation the remarkable document, called a message, containing chaages preferred by himself, and the House of

Delegates acting upon said message appointed a committee to investigate after the adjournment of the Legislature This committee was not constituted by a joint resolution of the Legislature which would make it a law, providing the constitution gives any such authority to the Legislature. A proposition which we not only question but deny and we are certain there is no Constitutional provision authorizing the House of Delegates to delegate to a committee its constitutional powers to be exercised when there is no Legislature to exist after the most effectual constitutional death of the House appointing the said committee.

If the Senator referred to in the message of the Governor contained in the record in this case were made in debate on the floor of the Senate, then he cannot be called in question at any other place than in the Senate for words spoken by him in debate. If the charges contained in the Governor's message to the House of Delegates were made by this Senator referred to outside of the Senate and outside of debate, then it is respectfully submitted that Senator is personally liable for any slanderous words he may have spoken, and false libel which he may have caused to be published against the alleged Governor of the State. And if the words were spoken in debate this Senator was not liable to be called in question by the House of Delegates, if it were in Session or out of Session, because of the Constitutional protection for words spoken in debate, and because if the words were spoken outside of the Senate Chamber by the Senator then if not tru they were slanderous and the remedy of the Governor was by action in the Courts of the State.

"But it is not to be supposed that these legislative powers are absolute and despotic, and that the Amendment prescribing due process of law is too vague and indefinite to operate as a practical restraint. It is not every Act, legislative in form, that is law. Law is something more than mere will exerted as an act of power. It must not be a special rule for a particular person or a particular case, but, in the language of Mr. Webster, in his familiar definition, "The general law, a law which hears before it

condems, which proceeds upon inquiry, and renders judgment only after trial," so 'that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society," and thus excluding as not due process of law, Acts of attainer, Bills of pains and penalties, Acts of confiscation. Acts reversing judgments and Acts directly transferring one man's estate to another, legislative judgments and decrees, and other similar special, partial and arbitrary exertions or power under the forms of legislation. Arbitrary power, enofrcing its edtcts to the jury of tht persons and property of its subjects, is not law, whether, manifested as the decree of a personal monearch or of an impersonal multitude. And the limitations imposed by our constitutional laws npon the action of the governments, both state and national. are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions. The enforcement of these limitations by judical process is the device of self governing committees to protect the rights of individuals and minorities, as well against the power of numbers as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government."——110 U. S, Supreme Report, Lawyer's Edition, page 238—239.

Respectfully Submitted.

Charles T. Caldwell. Appellee

By Counsel.

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